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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 563

UNIVERSAL CIGAR CORPORATION

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Fifth Circuit

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To the United Stgtes Court of Appeals
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Petitioner, Universal Cigar Corporation, petitions that a Writ of Certiorari be issued to review a judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on May 8, 1970.

OPINIONS BELOW

The opinion of the Court of Appeals (App. B. *infra* pp. 5-A, 6-A) is reported at F2 . The findings of fact, conclusions of law, and order of the National Labor Relations Board (App. E. *infra* pp. 8A-13A) are reported at 173 NLRB No. 129.

JURISDICTION

The opinion of the Court of Appeals for the Fifth Circuit was entered on May 8, 1970, and a petition of rehearing was denied on July 7, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTIONS PRESENTED

I. Did the Fifth Circuit grossly misapply the Substantial Evidence Rule in affirming the National Labor Relations Board's finding of a Section 8 (a) (3) violation by disregarding record evidence of Respondent's legitimate business motives?

II. Did the Fifth Circuit grossly misapply the Substantial Evidence Rule in affirming the National Labor Relations Board's finding of a Section 8 (a) (1) violation by disregarding record evidence showing that the alleged discriminatory questions were extremely isolated and occurred in a non-coercive context?

III. Does the Decision of the Fifth Circuit, in affirming the Board's finding of a Section 8 (a) (1) violation conflict with holdings of the Eighth Circuit?

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.A. 151, et sec.), are set forth in App. G, *infra*, pp 32A-33A.

STATEMENT OF THE CASE

In this case, the Court of Appeals for the Fifth Circuit sustained, in part, and reversed in part, a Decision and Order of the National Labor Relations Board in which it found that Universal Cigar Corporation had committed certain unfair labor practices in violation of Section 8 (a) (1) and Section 8 (a) (3) of the National Labor Relations Act as amended (hereinafter called "The Act").

A. THE FACTS

1. Failure to recall Tellis Smith.

Tellis Smith, a former employee of the Petitioner, applied for work June 5, 1967, after five weeks' absence. Zenobia Nolin, a department supervisor, told her that "things were slow" and that she should apply again after the scheduled vacation period.

On June 9, Tellis Smith was dropped from the payroll pursuant to the company's policy of terminating employees after six weeks' absence.

On June 23, thirty-five employees were laid off. Vice President Goldstein, who is in charge of personnel, selected persons for lay off on the basis of seniority and minimum wage make up. Many of the thirty-five had a history of minimum wage make up and two had greater seniority than Tellis Smith and no history of union activity. Goldstein testified that had Tellis Smith been at work on June 23, she would have been laid off at that time. The record shows that none of the thirty-five were recalled in 1967.

Beginning in July of 1967, several stripper jobs (machine operators) became available and were filled by new employees.

On September 28, 1967, Tellis Smith applied for work and filled out an application. On October 9, Petitioner hired a wrapper loosener [manual operation]. This was Tellis Smith's classification before her absence.

Tellis Smith's work revealed that in the fall of 1966 she had been employed as a stripping machine operator. After failing to meet her production quota 17 out of 25 work weeks, she was transferred from a piece rate job to a less demanding machine at an hourly pay rate. Subsequently, she was transferred, due to excessive waste of materials, from the stripping department, to the tobacco processing department where she was given an even less demanding job manually loosening tobacco wrapper.

In 1966 Tellis Smith served on the union organizing committee and served as an election observer. In 1967 she attended a meeting and signed a card but was not on the committee and, to Respondent's knowledge, was not active in organizational activities. The Petitioner legitimately campaigned against the union in the 1966 election.

Of the eight other members of the 1966 organizing committee, at the time of the hearing three had quit, one had been promoted to supervisor, one had been promoted in position and wages, and subsequently quit, one remained in the employment of the company, one had been discharged for sleeping on the job and one had been laid off June 23 and not recalled. Of the 1967 committee, at the time of the hearing, six had quit and two were still in the company's employ.

The record reveals that Petitioner has no established procedure for recalling laid off employees. If a department head needs personnel to fill vacancies, he informs the plant superintendent who in turn goes to a Vice President's office to review the applications on file. Vice President Goldstein has authority to choose whomever he likes. He testified that he bases his de-

cisions on seniority, ability, and work record. Thus he could have chosen any of the thirty-five laid off or he could have chosen new applicants for the jobs that opened from July through October, 1967, without violating recall procedure.

2. Interrogation of Frank Todd.

The Fifth Circuit affirmed the Board's finding of a Section 8(a)(1) violation for the coercive interrogation of an employee. The record reveals that the violation involved conversations between a foreman and a single employee that took place over a time span of a year and a half during working hours in a factory that employed 350 persons. These conversations were not overheard by others and there is no evidence that their subject matter was divulged by Todd to his co-workers. Todd and his foreman, Pursser, had worked together as late as the fall of 1966, when Pursser was promoted to foreman. Subsequently, they worked together on frequent occasions.

Understandably, there is no evidence that Todd was intimidated. Todd testified that Pursser questioned him about the strength of the union. However, the questions were asked when Todd approached Pursser for the purpose of having his named removed from the 1967 organizing committee. There is no evidence that the questions were relayed to management.

B. PROCEEDINGS BEFORE THE TRIAL EXAMINER

The Complaint against Petitioner was issued on December 19, 1967, and amended on January 8, 1968. It includes allegations charging Petitioner with violation of Section 8(a)(1) of the Act by the conduct of

Foreman Charles Pursser in the act of interrogating an employee about union activities and violation of Section 8 (a) (3) of the Act by (a) refusing to recall Tellis Smith since about July 10, 1967, and (b) discharging James E. Townsend, Jr., on October 20, 1967. A hearing was held before a Trial Examiner at Tampa, Florida on March 25, 26 and 27, 1968. The Examiner's Decision was issued on June 20, 1968. (App. F.)

C. THE BOARD'S DECISION AND ORDER

On November 19, 1968, a three member panel of the Board adopted the Examiner's findings of facts and conclusions and recommendations with regard to Tellis Smith and Frank Todd and reversed the Trial Examiner with regard to James E. Townsend, Jr.

The Board found, in adopting the Trial Examiner's Decision, that Petitioner violated Section 8(a)(3) of the Act by unlawfully failing to recall Tellis Smith. The Board based its conclusions on the following facts. A year before her absence, she served on the union organizing committee and served as an election observer. These facts were known to Petitioner, who had legitimately opposed the union. Beginning in July openings for which she was qualified occurred but she was not recalled. The Board also found that Petitioner shifted in its defenses indicating that the real reason it had failed to recall Tellis Smith was her known strong allegiance to the Union.

The Board found, in adopting the Trial Examiner's Decision, that Petitioner violated 8(a)(1) of the Act by coercively interrogating Todd. The Board's justi-

fication for this finding appears in a single sentence. "I find in context with the other unfair labor practices found herein that Pursser coercively interrogated Todd in violation of Section 8(a)(1) of the Act."

D. THE DECISION OF THE COURT OF APPEALS

The Court below enforced the Board's Order with respect to Frank Todd and Tellis Smith but reversed the Board with respect to James E. Townsend, Jr. In sustaining the Board's finding that the Petitioner's failure to recall Tellis Smith was in violation of 8(a)(3), the Court said simply "The Board's conclusion that the refusal to recall Tellis Smith was discriminatory, an 8(a)(1) and (3) violation, is supported by substantial evidence from the record as a whole. That determination was largely a matter of evaluating the credibility of witnesses, a function of the Board, *Universal Camera Corp, v NLRB,* 1951, 340 US 474, S.Ct.; *Great Atlantic & Pacific Tea Co. v NLRB* 5th Cir. 1966 354 F2 707."

In sustaining the Board's finding that Petitioner coercively interrogated Frank Todd in violation of Section 8(a)(1) of the Act, the Court was equally brief:

"Likewise the Board's conclusion that the questioning of employee Frank Todd about the strength of the Union constituted a violation of Section 8 (a)(1) is also supported by substantial evidence. Such questioning can be coercive, *NLRB v Sunnyland Packing Co.,* 5th Cir. 1966, 369 F2 787, and from the evidence here the determination that this was is supported."

REASONS FOR GRANTING WRIT

1. Failure to recall Tellis Smith.

The Court adopted the Board's finding that the following facts constituted substantial evidence of discriminatory motive for the failure to recall Tellis Smith. In the campaign which occurred thirteen months before she left Petitioner's employ, Tellis Smith served on the organizing committee, which was known to Petitioner, and acted as a union observer. In the 1967 campaign she attended one union meeting and signed a union membership card. This was not known to Petitioner. Tellis Smith applied for work June 5, 1967, and September 28, 1967. Beginning in July several strippers were employed but she was not recalled. According to the Board she had once performed satisfactorily as a stripper. In October a wrapper loosener was employed. According to the Board Tellis Smith has performed satisfactorily as a wrapper loosener prior to her absence.

Respondent also emphasized the fact that Petitioner in the course of the hearing "shifted in its defenses". The record reveals that Petitioner explained its failure to recall Tellis Smith on the grounds that she had a poor work record for over a year, work was unavailable when she applied, and her health was unsatisfactory.

The facts upon which the Board relied to find substantial evidence for its inference of discrimination constitute circumstantial rather than direct evidence of a discriminatory intent.

The Board could not have drawn the inference it did had it considered the hard facts on the record as a whole which indicate a nondiscriminatory motive. The Board held that jobs opened starting in July which Tellis Smith might have been offered. However, the Board dis-

regarded the fact that on June 23, thirty-five employees were laid off who were not recalled that year. Of the thirty-five two had greater seniority than Tellis Smith and no history of union activity. The Board also disregarded the fact that Petitioner has no established procedure for recall. Generally if a department head needs personnel to fill vacancies he informs the plant superintendent who in turn goes to Vice President Goldstein's office to discuss the available applicants with Goldstein, who has complete discretion in choosing new personnel. According to his undisputed testimony he bases his decisions on seniority, ability, and work record. Accordingly, he was free to choose from any of the thirty-five employees laid off or from new applicants. Many of the thirty-five had a history of minimum pay make up and none were recalled. Consequently, Tellis Smith's chances of being recalled in 1967 were extremely small.

It is significant that the facts on which Respondent relies to show a discriminatory motive constitute lawful activity, with the exception of the questioning of Todd about the strength of the union. (This alleged violation depends on the Section 8 (a) (3) violation and therefore on the evidence of lawful activity)[1] The effect of this holding is to make it impossible for an employer who exercises his Section 8 (c) rights in opposing a union to treat union advocates like other employees. The well known doctrine that the employer may discharge an employee for any reason or no reason as long as it is not a discriminatory reason can have no meaning if the Board is permitted to base a charge of discrimination on the lawful exercise of Section 8(c) rights. The effect

[1] "I find in context with the other unfair labor practices found herein that Pursser coercively interrogated Todd in violation of Section 8(a)(1) of the Act." App. F

of the Board's practice is to discourage the exercise of the employer's section 8(c) rights which is tantamount to chilling rights protected by the First Amendment. See *NLRB v Grand Foundries, Inc.* 362 F2 702 (1966), where the Eighth Circuit held that conduct protected by Section 8(c) and the First Amendment cannot be used as evidence of an unfair labor practice.

Next there is the matter of Tellis Smith's union activities. The Board emphasized the fact that Tellis Smith had served on the 1966 organizing committee and served as an election observer. Moreover, when she applied for work in June and September of 1967, the company was engaged in a campaign. There is also the fact that in 1967 Tellis Smith signed a card and attended a union meeting though there is no evidence that this was known to the company. Cumulatively this evidence indicates that Tellis Smith was a strong union supporter. A discriminatory motive might be inferred from these facts, were it not for other facts disregarded by the Board which preclude the inference. The record reveals that of the eight other members of the 1966 committee, at the time of the record, three had quit, one had been promoted to supervisor, one had been promoted in positions and wages and subsequently had quit, one was still employed, one had been discharged for sleeping on the job and one had been laid off in June 1967 and had not been recalled. Of the 1967 committee, at the time of the hearing six had quit and two were still employed by the company. There is consequently no evidence whatsoever on the record as a whole that Petitioner discriminates against committee members.

The Board in inferring a discriminatory motive, emphasized the "shifting nature of Plaintiff's defenses." The Petitioner attempted to explain his failure to recall

Tellis Smith by citing the unavailability of work, her poor work record and failing health. The Board found something inconsistant and incriminating about the Petitioner's inability to say just why it had failed to recall Tellis Smith. But is the Petitioner's apparent befuddlement that difficult to understand? Petitioner, after all was not asked why it did something, but why it failed to do something, namely, why it failed to recall one employee out of thirty-five. It is inherently unfair to impute a discriminatory motive to Petitioner for councel's inarticulation. Moreover, the cases cited by the Board involved diametrically opposed positions, unrelated defenses and contrived reasons for previously condoned infractions. It has never been held that an employer shifted in his defenses merely because he had more than one defense. This seems to be the basis of the Board's holding.

Although Petitioner appeared to have some difficulty explaining just why it failed to recall Tellis Smith, the whole record indicates that she was less than desirable from an economic standpoint. For example, in the fall of 1966 when Mrs. Smith was employed in the stripping department as a machine operator she failed to meet her piecerate quota 17 out of 25 work weeks. Her pay record indicates that her piecerate pay had to be supplemented during the 17 weeks in order to satisfy minimum wage requirements. Consequently, she was transferred to a less demanding job in the same department, which involved operating a machine on an hourly basis. The Board noted, then disregarded, testimony by two fellow employees of her extreme nervousness and wastefullness while employed at this second machine. No credibility finding was made concerning their testimony.

Subsequently, she was transferred into the tobacco processing department where she was given the job of shaking the tobacco wrappers. This involves manually loosening tobacco leaves. Her supervisor testified that her physical disability resulted in substantial waste while so employed. However, the Trial Examiner made a credibility finding against his testimony and found that there was no evidence which indicated that Tellis Smith was an unsatisfactory worker. Since this finding ignores the fact that Tellis Smith failed to make her piecerate quota in 1966, the finding bears its own death wound and must be disregarded by this Court. *NLRB v Pittsburgh Sheet Co.* 337 US 656, 660 (1949).

This Court said in *Universal Camera Corp. v NLRB* 340 US 474 (1951) with respect to judicial review of cases like the present:

> "Our power to review the correctness of application of the present standard (substantial evidence on the record as a whole) ought seldom to be called into action. Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeal. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprended or grossly misapplied." 340 US 490-491

Petitioner submits that the standard of substantial evidence was grossly misapplied by the Court below with respect to the Petitioner's failure to recall Tellis Smith. The Fifth Circuit grossly misapplied its proper standard of review by adopting a finding of the Board which failed to take into consideration the evidence in the record which indicated Petitioner's innocence. Totally disregarding the hard facts of the record indicat-

ing a non discriminatory motive, the Board relied on inference and conjecture to find a discriminatory motive. This Court made it clear in *Universal Camera Corp. v NLRB* that failure to consider the evidence in the record which detracts from the agency's finding contitutes a misapplication of the substantial evidence rule.

> "Whether or not it was ever permissable for Courts to determine the substantiality of evidence supporting a Labor Board decision purely on the basis of evidence which in and of itself justified it without taking into account contradictory evidence or evidence from which a conflicting inference could be drawn the new legislation definitely precludes such a theory of review and bars its practice. The substantiality of the evidence must take into account whatever in the record fairly detracts from its weight." *Universal Camera Corp. v Labor Board* 340 US 474 at 478, 488.

The necessity of considering the whole record has been attested to by the academic commentator, Lewis Jaffe:

> "Judicial review is designed, as has been said, to make sure that there is record evidence which provides a rational or logical basis for the finding and for the consequent presumption that the finding was in fact the product of reasoning from evidence. This must mean evidence in the context of the case. To abstract out of a case that part of the evidence which can be made to support a conclusion is to imagine an abstract case, a case that was never tried. A conclusion based on such abstracted evidence may be "rational" but it is not a rational decision of the case which was in fact tried. Evidence which may be logically substantial in isolation may lose its logical relevance, even its claim to credibility, in context with other evidence."[2]

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[2] Louis L. Jaffee, Judicial Review: Question of Fact, 69 Harvard Law Review 1021 at 1027. (1955-56.

When the evidence on the record as a whole is considered it becomes apparent that the Court in adopting the Board's findings rested its holding on inferences and conjectures while totally disregarding the hard facts which indicate Petitioner's innocence. This gross misapplication of the proper standard of review entitles Petitioner to a review by this Court. *Universal Camera Corp. v NLRB.*

2. The Interrogation of Frank Todd

The Board adopted the Trial Examiner's finding that Petitioner coercively interrogated Todd in violation of Section 8 (a) 1 of the Act. This finding was affirmed by the Fifth Circuit. However, it is based on the existence of another unfair labor practice, namely, the discriminatory failure to recall Tellis Smith.

> "I find in context with the other unfair labor practices filed herein that Pursser coercively interrogated Todd in violation of Section 8(a) (1) of the Act."

Since the Section 8(a) (1) violation depends upon the Section 8(a) (3) violation for discriminatory failure to recall Tellis Smith, reversal of the 8(a) (3) would perforce require the reversal of the Section 8(a) (1) violation. This dependence exists because Pursser's questions to Todd did not contain explicit threats. Whether they contained implied threats depends then on the context in which they were made. Though apparently innocuous, extrinsic evidence of interference may indicate that they contained implied threats of retaliation. Hence the dependence of the Section 8(a) (1) violation on the Section 8(a) (3) violation.

However, assuming that the conviction for failure to recall Tellis Smith is left undistrubed, Petitioner submits that there are additional reasons for reversing the Lower Court's holding that it violated Section 8(a)(1) by coercively interrogating Frank Todd.

The Fifth Circuit affirmed the Board's finding that the questioning of Todd was coercive soiely on the grounds that Pursser questioned Todd about *the strength of the union*. The Fifth Circuit did not hold that Pursser's questioning of Todd concerning the union sympathy of two employees was coercive.

> "Likewise the Board's conclusion that the questioning of employee Todd *about the strength of the union* constituted a violation of 8(a)(1) is also supported by substantial evidence. Such questioning can be coercive. *NLRB v Sunnyland Packing Co.* 5th Cir. 1966, 369 D2 787 and from the evidence here the determination that this was is supported." (Emphasis supplied)

Frank Todd, who served on the 1966 organizing committee and whose name was on the 1967 committee, testified as a Board witness. His account of the episodes in question appears in the following passage:

Q: Now, Mr. Todd, has any supervisor at the plant ever inquired about your activities or sympathies, how you felt about the union?

A: Charles Pursser.

Q: All right, sir. Can you tell us, generally did this happen more than once?

A: Ah, many, many times.

Q: Can you tell us, generally, when this happened in the span of time?

A: Well, it happened mostly the last part of '67.

Q: Okay, now, was there ever anybody present when these discussions took place?

A: Always just him and I.

Q: Just the two of you? Was it during working hours?

A: Yes, sir.

Q: Would you relate to us what Mr. Pursser asked you.

A: He asked me if I think the unions were very strong, thought it might come in sometime, things like that.

The Board held that Pursser's questions contained an implied threat. It based its finding on the fact that the Petitioner had discriminitorily refused to recall another employee. Again disregarding the hard facts on the record which indicated that the conversations could not have contained an implied threat, the Court grossly misapplied the substantial evidence rule.

As seen above, Todd admitted that no other employee overheard the conversations. There is no evidence that Todd spoke with other employees about them. They occurred during working hours over a time span of a year and a half in a factory of 350 employees. The record reveals that Pursser and Todd had worked together as fellow employees as late as the fall of 1966 when Pursser was promoted to foreman. Subsequent to the promotion the two worked together frequently. There is

no evidence that the questions intimidated Todd or that he gave untruthful or evasive answers. There is no showing that his answers were relayed to management. The questions do not appear to have been asked on behalf of management as part of a premeditated plan for gaining information about the union, for on the occasions when the two men discussed the topic of the union, Todd, and not Pursser, broached the subject for the purpose of having his name removed from the organizing committee of 1967.

The Board held that the questions contained an implied threat in the context of the other unfair labor practice. However, the failure to recall Tellis Smith simply does not provide evidence that the questions contained an implied threat. It is conceivable that discriminatory practices could have the effect of turning an otherwise innocuous question into a threat of retaliation. But in the present case the alleged discriminatory failure to recall took place in the context of a layoff. Consequently, it probably made no impression upon the employees at all. It could hardly have so charged the atmosphere with fear and repression that the conversations between the old friends, Todd and Pursser, were thereby converted into implied threats. The only evidence offered by the Board to support its Section 8(a)(1) finding, the discriminatory failure to recall Tellis Smith, is utterly without persuasive effect and in fact is not evidence at all.

By disregarding the evidence detracting from the Board's finding of a Section 8(a)(1) violation, the Fifth Circuit has grossly misapplied the substantial evidence rule. This misapplication entitles Petitioner to review by the Supreme Court. *Universal Camera Corp. v. N.L.R.B.* 340 U.S. 474 (1951)

III. CONFLICT WITH THE EIGHTH CIRCUIT

The Fifth Circuit's holding adopting the Board's finding of a violation of Section 8(a)(1) should be reviewed for a second reason. The holding of the Fifth Circuit conflicts with cases of the Eighth Circuit. In adopting the Board's finding that the questioning of Todd was coercive because it occurred in the context of the discriminatory failure to recall Tellis Smith, the Fifth Circuit has sub silentio enunciated a per se rule. The rule of law which emerges from this case is that if the questioning of an employee about union activity is accompanied by a discriminatory discharge the questioning is thereby rendered coercive. There is no finding that the failure to recall in this case had the effect of intimidating the employees so that when Todd was questioned by Pursser his otherwise innocuous questions were converted into veiled threats of retaliation. In adopting the Board's finding the Fifth Circuit has held that a questioning is rendered coercive whenever accompanied by a discriminatory refusal to recall even if the discrimination has no effect on the questions' potential for coercion.

The Eighth Circuit has expressly rejected this rule of law. In *NLRB v. Grand Foundries, Inc.*, 362 F2 702, (8th Cir 1966) the Employer's works manager questioned employees on their union sympathies. Though the employer was found to be in violation of Section 8(a)(2) and 8(a)(1) for domination and unlawful promises, the Eighth Circuit held that its works manager had the right to question the employees on their union sympathies.

> "Did Respondent interfere with, restrain, or coerce its employees in their exercise of their right to organize or to join a labor organization, as proscribed

> by Section 8(a)(1)? Works Manager Furlani had the right to ask any employee if that employee were supporting the union or if he were in favor of the union and also present management's view or argument on the union issue." 362 F2. at 707 - 708.

In *NLRB v. Council Manufacturing Corp.*, 334 F2 161 (8th Cir. 1964) the employer was charged with a Section 8(a)(1) violation for the statement of a plant manager that the plant would be closed down or automated if the union won an upcoming election. The only evidence offered to show the coerciveness of this statement was an alleged Section 8(a)(3) violation based on a discriminatory discharge. The Court upheld the Board's finding of a Section 8(a)(3) violation but declined to enforce the Board's 8(a)(1) violation on the grounds that it lacked substantial evidence:

> "We regard this disputed testimony despite its creditation by the Trial Examiner and by the Board and despite its characterization in the Board's Brief as an "obvious violation" as too thin a crust on which to rest anything as serious as an 8(a)(1) violation. We have the impression that the Board of late has intended to overstretch this type of issue and that in light of Universal Camera a foundation of much greater substance is required than the isolated statement present here."

In an earlier Eighth Circuit case, *NLRB v. Trumbell Asphalt Company of Delaware* 327 F2 841 (1964), a plant superintendent, after learning from the union that it claimed majority status, questioned an employee as to "who was for the union". A few days later the superintendent asked the employee who the head of the union was. The Court held that these questions did not constitute a threat and refused to enforce the Board's Section 8(a)(1) order. However, the Court went on to

uphold the Board's finding of an 8(a)(3) violation for the discriminatory discharge of three employees. Compare *NLRB v. Byrds Manufacturing Corp.*, 324 F2 329 (8th Cir. 1963).

The above cases of the Eighth Circuit are repugnant to the per se approach of the Fifth Circuit. The Fifth Circuit's rule that an accompanying discriminatory act necessarily renders questions about union activity coercive should therefore be reviewed by this Court.

The Fifth Circuit's per se rule also conflicts with this Court's decision in *Hudson Water Works v. Macarter*, 209 U.S. 349, 355 (1908). There this Court said that the point at which the rights of the state overcome those of the individual cannot be determined by a rigid standard.

> "The boundary at which the conflicting interests balance cannot be determined by a general formula in advance."

The per se rule of the Fifth Circuit predetermines Petitioner's First Amendment rights. Its effect is to deprive him of First Amendment protection whenever he questions an employee about a union and concurrently violates Section 8(a)(3) of the Act. Accordingly, the decision of the Fifth Circuit deprives the Petitioner of its First Amendment protection as interpreted by this Court in *Hudson Water Works v. Macarter.*

CONCLUSION

For the foregoing reasons the Fifth Circuit's affirmation of the Section 8(a)(1) and 8(a)(3) findings should be reviewed by this Court.

Respectfully submitted,

Law Offices of
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GRANVILLE M. ALLEY, JR.

LEO P. ROCK

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition and the Appendices attached has been served by certified mail on the following parties:

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APPENDIX A

JUDGMENT OF U. S. COURT OF APPEALS FOR FIFTH CIRCUIT ENTERED JUNE 4, 1970

Before: Brown, Chief Judge, and Bell and Ingraham, Circuit Judges.

THIS CAUSE came on to be heard upon the application of the National Labor Relations Board to enforce its order issued on November 19, 1968, against the above-named Respondent, its officers, agents, successors, and assigns. The Court heard argument of respective counsel on April 20, 1970, and has considered the briefs and transcript of record filed in this cause. On May 8, 1970, the Court being fully advised in the premises, handed down its opinion granting in part and denying in part enforcement of the Board's said order. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the Court that Universal Cigar Corporation, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in the Cigar Makers International Union, AFL-CIO, or in any other labor organization of their employees by refusing to recall any employee or in any other manner discriminating in regard to the hiring or the tenure of employment or any term or condition of employment.

(b) Interrogating employees with respect to their own union activities.

(c) In any other like manner interfering with, restraining or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action which the Board has found necessary to effectuate the policies of the Act:

(a) Offer to Tellis Smith immediate, full and unconditional employment in her former job or substantially equivalent position of employment without prejudice to her seniority or other rights and privileges and make her whole for any loss of pay suffered by her in the manner set forth in the Section of the Trial Examiner's Decision entitled "The Remedy."

(b) Notify the above-named employee if presently serving in the Armed Forces of the United States of her right to full employment upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

(c) Upon request make available to the Board and its agents for examination and copying all payroll and other records containing information concerning Respondent's backpay obligation under this Judgment.

(d) Post at its factory at Clearwater, Florida, copies of the Notice attached hereto marked "Appendix." Copies of said Notice on forms furnished by the Regional Director of Region 12, (Tampa, Florida) after being duly signed by an authorized representative of Respondent, shall be posted by Respondent immediately upon receipt thereof and maintained by it for a period of 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced or covered by any other material.

(e) Notify the said Regional Director, in writing, within 10 days from the date of this Judgment what steps the Respondent has taken to comply herewith.

ENTERED: June 4, 1970

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A Judgment of the United States Court of Appeals
Enforcing in part an Order of the

NATIONAL LABOR RELATIONS BOARD

and in order to effectuate the policies of the

NATIONAL LABOR RELATIONS ACT

we hereby notify our employees that:

WE WILL NOT refuse to recall or take any other discriminatory action against any employee because he is a member of or supports the CIGAR MAKERS INTERNATIONAL UNION, AFL-CIO, or any other labor organization.

WE WILL NOT ask you questions about your union activities.

WE WILL offer to Tellis Smith employment in her former job or substantially equivalent position of employment without loss of any seniority or other rights and we will make Smith whole for any loss of pay she may have suffered by reason of the discrimination against her.

All our employees have the right to form, join or assist any labor organization or not to do so.

WE WILL NOT interfere with, restrain or coerce our employees in the exercise of this right.

UNIVERSAL CIGAR CORPORATION

(Employer)

Dated: _____ By: _____

(Representative) (Title)

NOTE: We will notify the above-named employee, if presently serving in the Armed Forces of the United States, of her right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act of 1948, as amended, after discharge from the Armed Forces.

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.
compliance with its provisions, they may communicate directly

If employees have any question concerning this Notice, or with the Board's Regional Office, Room 706, Federal Office Building, Zack Street, Tampa, Florida, 33602. (Tel. No. 228-7227).

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
v. No. 28,483
UNIVERSAL CIGAR CORPORATION,
Respondent,

CERTIFICATE OF SERVICE

The undersigned certifies that one copy of the Board's proposed judgment in the above case has this day been served by first class mail upon the following counsel at the address listed below:.

Leo P. Rock, Jr., Esquire
Law Offices of Granville M. Alley, Jr.
P. O. Box 1427
Tampa, Florida 33601

/s/ Marcel Mallet-Prevost

Marcel Mallet-Prevost
Assistant General Counsel

Dated at Washington, D. C.
this 15th day of May, 1970

APPENDIX B

DECISION OF U. S. COURT OF APPEALS FOR FIFTH CIRCUIT, ENTERED MAY 8, 1970. No. 28483

PER CURIAM: Again the NLRB petitions for enforcement of its order finding that the employer engaged in unfair labor practices. In that special numerical jargon with which we have become too familiar, this case involves an 8(a)(1) and 8(a)(3)'s.[1] And here as in so many cases the only issue involved is whether the Board had substantial evidence from which to find that there were discriminatory practices. We conclude that such substantial evidence existed for two of the three incidents, and that it did not exist in the third.

The Board's conclusion that the refusal to recall Tellis Smith was discriminatory, a §8(a)(1) and (3) violation, is supported by substantial evidence from the record as a whole. That determination was largely a matter of evaluating the credibility of witnesses, a function of the Board, *Universal Camera Corp. v. NLRB*, 1951, 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed.2d 456; *Great Atlantic and Pacific Tea Co. v. NLRB*, 5 Cir., 1966, 354 F.2d 707. Likewise, the Board's conclusion that the questioning of Employee Todd about the strength of the union constituted a violation of §8(a)(1) is also supported by substantial evidence. Such questioning can be coercive, *NLRB v. Sunnyland Packing Co.*, 5 Cir., 1966, 369 F.2d 787, and from the evidence here the determination that this was is supported.

We refuse, however, to enforce the Board's finding, which overruled a hearing examiner's determination and from which one member dissented, of a §8(a)(3) and (1) violation in the discharge of James Townsend. The solicitation by Townsend clearly violated a valid no-solicitation rule. And, despite testimony about turkey

[1] 29 U.S.C.A. §158(a). (1) and (3).

raffles and Avon ladies, there is no substantial evidence for the conclusion of disparate enforcement or waiver of the rule. *Mason & Hanger-Silas Mason Co. v. NLRB*, 5 Cir., 1968, 405 F.2d 1.

ENFORCEMENT GRANTED IN PART AND DENIED IN PART.

APPENDIX C

ORDER OF U. S. COURT OF APPEALS FOR FIFTH CIRCUIT DENYING PETITION FOR REHEARING ENTERED JULY 7, 1970

IT IS ORDERED that respondent's motion for leave to file petition for rehearing out of time in the above styled and numbered cause is hereby GRANTED; the Petition for Rehearing is DENIED.

APPENDIX D

ORDER CORRECTING DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD ENTERED NOVEMBER 27, 1968

On November 19, 1968, the National Labor Relations Board issued a Decision and Order[1] in the above-entitled proceeding in which inadvertent errors appear.

IT IS HEREBY ORDERED that the said Decision and Order be, and it hereby is, corrected as follows:

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[1]173 NLRB No. 129.

A. Strike from the third line on page 3, the name "Frank Townsend", and substitute therefor the name "James E. Townsend, Jr."

B. Strike paragraph 4 of the Order in its entirety, and substitute therefor the following:

4. Modify the NOTICE TO ALL EMPLOYEES attached to the Trial Examiner's Decision as follows:

(a) Substitute the following for the third paragraph thereof:

> WE WILL offer to Tellis Smith and James E. Townsend, Jr. employment in their former jobs or substantially equivalent positions of employment without loss of any seniority or other rights and we will make them whole for any loss of pay they may have suffered by reason of the discrimination against them.

(b) Substitute the following for the Note thereon:

> NOTE: We will notify the above named employees if presently serving in the Armed Forces of the United States, of their right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act of 1948, as amended, after discharge from the Armed Forces.

(c) Correct the telephone number for region 12 to read 228-7711.

IT IS FURTHER ORDERED that the Decision and Order, as printed, shall appear as hereby corrected.

Dated, Washington, D. C., November 27, 1968.

By direction of the Board:

John C. Truesdale
Deputy Executive Secretary

APPENDIX E

DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD ENTERED NOVEMBER 19, 1968 (173 NLRB No. 29)

On June 20, 1968, Trial Examiner W. Edwin Youngblood issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. He also found that the Respondent had not engaged in certain other unfair labor practices alleged in the complaint and recommended that such allegations be dismissed. Thereafter, the General Counsel and the Respondent filed exceptions to the Trial Examiner's Decision together with supporting briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearings and finds that no prejudicial error was committed. The rulings are hereby af-

firmed. The Board has considered the Trial Examiner's Decision, the exceptions and briefs, and the entire record in this case, and hereby adopts the findings,[1] conclusions,[2] and recommendations of the Trial Examiner, as modified herein.

The Trial Examiner found that the Respondent did not violate Section 8(a)(3) and (1) of the Act by discharging James E. Townsend, Jr. for passing out a union card in violation of a valid no-solicitation rule. Although it is undisputed that Townsend violated the rule, it is our opinion that the Respondent discriminatorily applied the rule when Townsend was discharged on October 20, 1967.

The Respondent promulgated the no-solicitation rule in October, 1966, after an unsuccessful union organizing campaign. Since that time, many violations of the rule occurred. Vegetables were sold in July, 1967, during working time and with the approval of supervisor Nolin. Stockings were modeled in the wrapper loosening department sometime in 1967. That same year cookies were sold in the packing departments. In November 1967, a memorandum was circulated in the packing department asking for money for Christmas presents. There was a passing of a "flower-pot" fund on company time. Supervisor Nolin had engaged in selling Avon cosmetics and admitted that some employees paid her on Company time by means of putting money in her pocket as she walked by. None of the

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[1]Footnote 8 is amended as follows: Although Todd was listed as a member of the 1967 organizing committee, he was not actually on the committee.

[2]These findings and conclusions are based, in part, upon credibility determinations of Trial Examiner, to which the Respondent has excepted. Having carefully reviewed the record, we conclude that the Trial Examiner's credibility findings are not contrary to the clear preponderance of all the relevant evidence. Accordingly, we find no basis for disturbing those findings. *Standard Dry Wall Products, Inc.*, 91 NLRB 544, enfd. 188 R.2d 362 (C.A. 2).

employees involved in these incidents was discharged or reprimanded although it is apparent that supervisors with the authority to hire and fire knew of them.

It was not until the Townsend incident occurred in the midst of the renewed union campaign which began in July 1967, that the Employer saw fit to invoke the no-solicitation rule. The Employer discharged Townsend without warning and without discussing the incident with him prior to making the decision to fire him.[3]

We are therefore convinced that the record as a whole established disparate treatment against Townsend, and that his dismissal for violating the no-solicitation rule was merely a pretext.

THE REMEDY

Having found that the Respondent, Universal Cigar Corporation, has engaged in violations of Section 8(a)(3) and (1) of the Act, it will be ordered to cease and desist from the unfair labor parctices found and from in any other manner infringing upon the statutory rights of its employees offer Tellis Smith and Frank Townsend immediate, full, and unconditional employment in their former jobs or substantially equivalent positions of employment without prejudice to their seniority or other rights and privileges, and reimburse them for any loss of pay suffered as a result of the discrimination against them in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289, 291-293 and *Isis Plumbing & Heating Company*, 138 NLRB 716, and post appropriate notices.

CONCLUSIONS OF LAW

We hereby adopt the Trial Examiner's Conclusion of Law except for paragraph 4, for which we make the following substitution:

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[3]See *Talon, Inc.*, 170 NLRB No. 42.

4. By discharging James Townsend on October 20, 1967, the Respondent violated Section 8(a)(3) and (1) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the Trial Examiner, and orders that the Respondent, Universal Cigar Corporation, Clearwater, Florida, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order, as herein modified.

1. Amend paragraph 2(a) to read: Offer to Tellis Smith and James Townsend . . . and make them whole for any loss of pay suffered by them in the manner set forth in the above section entitled "The Remedy."

2. Amend paragraph 2(b) to read: " . . . above-named employees . . . of their right. . . ."

3. Delete the recommendation of the dismissal of the amended complaint insofar as it alleges Respondent violated the Act by the discharge of James Townsend.

4. Substitute the following for the third paragraph of the Notice attached to the Trial Examiner's Decision.

> WE WILL offer to Tellis Smith and Frank Townsend employment in their former jobs or substantially equivalent positions of employment without loss of any seniority or other rights and we will make them whole for any loss of pay they may have suffered by reason of the discrimination against them.

Dated, Washington, D. C., Nov. 19, 1968.

Gerald A. Brown, Member

Howard Jenkins, Jr., Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

Member Zagoria, dissenting in part:

For essentially the reasons relied on by the Trial Examiner, I would not find that the Respondent's discharge of Townsend was unlawful. As the Trial Examiner points out, the instances of solicitation in violation of the rule known to the Respondent's supervisors were minimal.

In addition, as I have indicated in other cases,[4] I do not believe that an employer who permits limited worktime solicitation which is unrelated to union or concerted activity thereby forfeits his right to maintain and enforce in a nondiscriminatory manner a rule barring solicitation which is related to union or concerted activities. The solicitation on which my colleagues rely to support their conclusion of disparate treatment was limited in nature and clearly unrelated to union or concerted activities.

In all the circumstances, I am not persuaded that there is a preponderance of the evidence to establish that Townsend was discharged for any reason other than his violation of a lawfully maintained and lawfully enforced no-solicitation rule. I would therefore adopt the Trial Examiner's Decision without modification.

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[4] E.g. *Saco-Lowell Shops, a Division of Maremont Corporation*, 169 NLRB No. 151; *Marlene Industries Corporation*, 166 NLRB No. 58; and *Gooch Packing Company*, 162 NLRB No. 2.

Dated, Washington, D. C. Nov. 19, 1968.

Sam Zagoria, Member
NATIONAL LABOR
RELATIONS BOARD

APPENDIX F

DECISION OF THE TRIAL EXAMINER OF THE NATIONAL LABOR RELATIONS BOARD

W. EDWIN YOUNGBLOOD, Trial Examiner: The complaint,[1] as amended on January 8, 1968, alleges that Universal Cigar Corporation, herein called Respondent or the Company, violated Section 8(a)(1) of the Act by the conduct of Foreman Charles Pursser in interrogating an employee about union activities and violated Section 8(a)(3) of the Act by (a) refusing to recall Tellis Smith since about July 10, 1967 and (b) discharging James E. Townsend, Jr. on October 20, 1967.

I conducted a hearing in Tampa, Florida, on March 25, 26 and 27, 1968. At the conclusion of the hearing, the General Counsel and Respondent made oral statements of position and since the hearing I have received briefs from the General Counsel and the Respondent. Respondent's motion to dismiss the complaint upon which I reserved ruling at the conclusion of the hearing is disposed of in accordance with the findings and conclusions set forth herein.

[1] Issued December 19, 1967, upon charges filed October 11, 1967, and October 27, 1967, by the Cigar Makers International Union, AFL-CIO, herein called the Union.

Upon the entire record,[2] including my evaluation of the witnesses based on the evidence and my observation of their demeanor, I make the following:

FINDINGS OF FACT

I. The Business of Respondent

Respondent, a New York corporation, is engaged at Clearwater, Florida, in the manufacture, sale and distribution of cigars, and during the 12 months preceding issuance of the complaint, shipped cigars valued in excess of $50,000 from Clearwater to points directly outside the State of Florida. Upon these admitted facts, I find that Respondent is engaged in commerce within the meaning of Section 2 (6) and (7) of the Act.

II. The Labor Organization Involved

John P. McGivern (staff organizer for the Union) credibly testified that the Union admits employees to membership and bargains collectively with employers for employees regarding wages and working conditions. Accordingly, I find that the Union is a labor organization within the meaning of Section 2 (5) of the Act.

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[2] I am in receipt of a motion to correct the record filed by the General Counsel. Respondent objects to certain portions of the motion on the ground that they make material alterations in the substance of the record. The proposed changes conform to their context in the record or to my recollection of the testimony. Accordingly, the motion is granted with the following qualification: I note regarding the proposed change on page 110, line 9 that the motion is obviously erroneous. There is no word "she" to change to "he" but there is the word "he" to change to "she." Therefore the word "he" is corrected to read "she." In addition, I note and make the following corrections to the record:

Page	Line	Change
4	8	"original" to "regional"
5	1	"varying" to "clarifying"
12	19	"enjoined" to "joined"
13	14	strike the word "General"
421	8-9	"most spurious" to "multifarious"
469	21	"despite the" to "disparate"

III. The Unfair Labor Practices Alleged

A. *The Interrogation of Todd*

Frank Todd testified that he worked under the immediate supervision of Foreman Charles Pursser as a wrapper wetter. Todd had many conversations with Pursser about the Union, most of which occurred in the last part of 1967. In these conversations Pursser asked Todd if he thought the unions were very strong and if he thought it might come in sometime . . ." Pursser also asked Todd if he knew which way some employees were going. For example, Pursser asked Todd regarding a newly hired employee named Sherrel Cutts if he thought Cutts was with the Union. Pursser also asked Todd if he thought an employee named Melvin Banks was for the Union.[3]

I find in context with the other unfair labor practices found herein that Pursser coercively interrogated Todd in violation of Section 8(a)(1) of the Act.

B. *The failure to recall Smith*

Tellis Smith worked for Respondent about 12 years in all departments. Smith was well-known to Respondent as a strong union adherent having been named in a ...e to Respondent dated May 19, 1966, as one of the seven employees who were active members of the Union in its campaign to organize Respondent's workers. Smith served as an observer for the Union in the Board conducted election in August 1966 which the Union lost. Shortly before entering the hospital on April 18, 1967, for tests, Smith talked to Floorlady Zenobia Nolin, an admitted supervisor within the meaning of the Act, about her expected entry into the hospital. Smith was "scared to take the operation" and

[3]The foregoing is based on the credited testimony of Todd. To the extent that Pursser's testimony is at varience with the foregoing it is not credited.

Nolin told her to "trust God" and she would be all right and further Nolin told Smith that she did not have anything to worry about and that her job would be waiting for her when she came out and was able to go back to work.[4] After the tests were completed, Smith returned to work for a few days and then re-entered the hospital on May 1, 1967, for an operation—a hysterectomy. She had her final check-up on June 3 and her physician advised that she could return to work on June 5, that she was "okay." On Sunday night, Smith telephoned Nolin to tell her that she was ready to go back to work. Nolin at first told Smith to come in on Monday; then Nolin asked if Smith had a release. Smith replied that she did not and Nolin told her that the Company had new rules and Smith would have to have a release. Smith said that she would go get one on Monday and come in Tuesday and Nolin said "all right." On Tuesday Smith went to the factory and told Nolin that she had the release. Nolin then told Smith that there was not anything to do—"there wasn't very much work" and asked Smith if she would stay off till after vacation. Nolin told Smith that she would be called back to work after the vacation:[5] Nolin suggested that Smith try to get her unemployment pay but Smith told Nolin that she would rather have her vacation and then try to draw unemployment. On the same day, Smith talked to Purser who told her that he would like to have her work for him; that she was a good worker. Smith gave the medical release to Sandra Bergman, an office employee who does payroll and insurance work for Respondent. Bergman told Smith that she could not draw unemployment because she was still on the pay-

[4]Tellis Smith's daughter-in-law was present during this conversation and corroborates Smith's testimony. Nolin admitted telling Smith when Smith told her of the impending operation that Smith would be back to work.

[5]Respondent usually experiences a slack period in the summer and was shut down for two weeks for vacation in the summer of 1967. Thirty-five employees were laid off on June 23 and the factory reopened July 10, 1967.

roll. Bergman also advised that they would call Smith and tell her whether or not she would draw her vacation pay but they never called Smith.

On September 21, 1967, Smith went to the factory seeking work and was permitted to fill out an application. Smith returned to the factory on September 28, and talked to Morton Goldstein, Respondent's vice-president and manager of shipping and receiving department, about going to work. Goldstein told her that they did not have anything to do, that he had her application on file and as soon as they had some empty stripping machines he would call her. Smith was never returned to work by Respondent.[6]

The Union reactivated its organizational campaign in earnest at Respondent's factory in July 1967 and held fairly regular meetings with employees and handbilled the factory. Smith signed a union card in July. About November 1, 1967, Respondent was notified the names of the 1967 organizing committee — only one person was listed on this committee who had been on the 1966 organizational committee—Frank Todd.[7]

Todd testified regarding this matter that for 2-3 days "everybody" seemed very unfriendly. About this time Todd had a conversation with Melvin Banks who advised him that his name was listed on the Union committee. Todd stated that it was not supposed to be and asked Pursser about it because he wanted to know what was the matter with everybody.[8] Pursser said that he did not know but would find out. A short time later, Pursser returned and confirmed to Todd that his name was on the letter to Respondent. Todd then stated that he wanted to see John Cueva, Respondent's factory superintendent. Cueva and Todd had a conversation

[6]The foregoing is based on the credited testimony of Smith except as otherwise indicated.

[7]The foregoing is based on the credited testimony of McGivern.

[8]Todd was not on the 1967 organizing committee.

about the matter and Cueva, too, confirmed that Todd's name was on the letter. Later Eloy Vega, Respondent's vice-president and general manager, came to see Todd and told Todd that he had heard from Cueva that Todd did not want to be on the committee. Todd said that he wanted to know how to get off the committee and Vega advised him to write the Union and ask them to withdraw his name. Todd never did write the letter. Several times after this Pursser asked Todd if he had written the letter and Todd replied in the negative and asked Pursser if he would write it. Pursser left and returned shortly and stated that he could not write it and suggested to Todd that he get his wife to write it. Pursser told Todd that if he did not write the letter Vega would be "very, very unhappy," and would think that Todd worked for the Union.[9]

Some time after Labor Day, Smith's husband, Burie Smith, who was also an employee of Respondent and worked under Pursser, asked Pursser when his wife was coming back to work. Pursser replied that he would like to have Mrs. Smith back at work and said that he had talked it over with John Cueva (Respondent's factory superintendent). Cueva told Pursser that they were not going to hire any more girls right then and Pursser would have to make out with what he had.[10]

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[9]The foregoing is based on the credited testimony of Todd. Pursser confirmed that he talked with Todd in the fall of 1967 about a letter to the Union to get Todd's name off the committee list. To the extent that Pursser's testimony is at variance with that of Todd it is not credited. The General Counsel does not contend that the foregoing constitutes independent evidence of unfair labor practices; it is offered insofar as it has bearing on the motivation for the discrimination with respect to Smith.

[10]The foregoing is based upon the credited testimony of Burie Smith. Pursser, when asked about this conversation, at first firmly denied that it had occurred. When shown his Board affidavit, he finally did recall the conversation and further affirmed that he did consider Smith for employment and did not recall her only because he thought she was still under a doctor's care.

During the fall of 1967 about 6 or 7 weeks after the vacation ended on July 10, Frank Todd heard some of the girls asking Pursser when Smith was coming back to work and if she was coming back and Pursser replied that he did not know but that he would be glad to have her back.[11]

As noted above, the General Counsel alleged in his complaint that Respondent has since July 10, 1967, failed and refused to recall Smith because of her union activities. It is conceded by Respondent that Smith sought employment with Respondent approximately July 20-25, 1967. We turn now to Respondent's defense to this allegation.

A pretrial conference was held at which attorneys stated their positions regarding the issues in this case. Early in the hearing, Morton Goldstein testified that as far as he knew Smith's physical condition had nothing to do with Respondent's failure to recall her to work. At that point, I stated to Respondent's attorney, Mr. Rock, that I had understood from our pretrial conference that the reason Smith was not recalled as far as Respondent was concerned was her physical condition. I inquired if that was correct and Rock stated that it was. Rock added that unsatisfactory work resulted from inability to perform work and Smith's physical condition was such that she could not perform the work in the position she had held. When it later appeared during the hearing that an issue might be developing as to lack of work being the reason for Respondent's failure to recall Smith, I stated that I had understood that the reason she was not recalled was due to a physical condition. Respondent's attorney then stated that was "essentially Respondent's position" but that issues might come out during the hearing that neither side was aware of prior to going into the hearing, and he would not want to "preclude" himself. I then inquired if it was Respondent's position that Smith was not recalled not

[11]The foregoing is based on Todd's credited and undenied testimony.

only because of health but also because of lack of work. Mr. Rock stated that tied in with the overall situation and further replied that lack of work would have a bearing on Respondent's defense. Rock also stating that even assuming a normal work load, Smith would not have been hired because she could not do the work she formerly did. Rock then stated that she would not have been recalled because of lack of work at least up to the start of the Christmas rush. Rock agreed that Respondent did hire employees in September or October 1967 to perform work which was of the same type that Smith had performed.

Goldstein testified in support of Respondent's defense that both Pursser and Nolin had complained to him about the quality of Smith's work. Several employees testified that Smith had a nervous difficulty, that Nolin had trouble with her work, and also that Smith was wasteful. In fact, Nolin testified that Smith was tranferred from her department (stripping) to Pursser's department (processing) in January 1967 because of waste in connection with her work. Nolin testified that she talked with Smith "time and time again" about her waste in removing the stems from leaves. Nolin further testified that although Smith was able to meet her quota on the P. L. filler which was based on an hourly rate and could meet the production quota on Pennsylvania tobacco, she could not meet the quota on wrapper tobacco.

Pursser testified that Smith was nervous and broke leaves of tobacco and that he corrected her "several" times about that. When queried about how many times he talked with Smith, Pursser testified "3 or 4 times a day, sometimes." Later when recalled as a witness, Pursser testified that he talked with Smith about her nervousness "about 3 times" between January and March 1967. Pursser also testified that Smith was an unsatisfactory worker in his department and that he told Smith she was not an average worker "3 or 4 times a day, sometimes" in 1967. Further, Pursser testified

that Smith worked in his department some in 1966 and he talked to her then about her work, and also talked to her in 1965 about her work.

On the other hand, Smith denied that Nolin had ever talked to her about waste and further denied that Pursser had ever said anything to her individually about leaves, or talked to her about nervousness. Also, Smith denied that Nolin had ever criticized her work. Smith impressed me as an honest, forthright witness. On the other hand, Pursser made a singularly unimpressive witness both as to demeanor and his vague and contradictory testimony. Nor did I find Nolin to be an impressive witness. I note also that Pursser admitted on cross-examination that the reason he did not consider Smith for hire when Helen Chasen was employed on October 9, 1967, was because he thought Smith was still under the doctor's care. I note further Pursser's statements to Burie Smith and other employees that he would like to have Tellis Smith come back to work. Then too, it is clear from the testimony that Nolin told Smith before her operation that her job would be waiting for her when she was able to come back to work. All the foregoing statements by Pursser and Nolin are clearly inconsistent with their other testimony that Smith was an unsatisfactory employee unworthy of rehire. Accordingly, I credit Smith's testimony and reject the contrary testimony of Pursser and Nolin.

It is apparent from the foregoing credited testimony that Smith was a satisfactory employee to both her supervisors with some 12 years experience at Respondent's factory; nevertheless Respondent did not recall her after the operation. Obviously it was not because of her work or physical condition and I must reject Respondent's defense based on the quality of her work or her physical condition as pretextual. In connection with the defense related to lack of work, I note that Respondent employed a person in the classification of stripper in July 1967 (GC 4) which was work that

Smith had satisfactorily performed. Subsequently, in August and September and later Respondent employed a number of strippers including stripper-learners without offering employment to Smith. In addition, other employees were hired in classifications where Smith had worked. It is apparent that lack of work was not the reason. Respondent failed to recall Smith. Why then was Smith not recalled?

It is clear from the record that Respondent was strongly opposed to attempted organization of its employees by the Union. Thus I note Pursser's interrogation of Todd about employees' union activities in an effort to determine the strength of the Union and the union sympathies of certain employees, Pursser's statement to Todd that Vega would be unhappy if Todd did not write the Union to withdraw his name as a union organizer, and Respondent's letter to its employees (GC 3) which is highly critical of the Union. Smith's strong adherence to the Union and leading activities on behalf of the Union in the 1966 campaign were well-known to Respondent. In July 1967, the Union renewed its efforts to organize Respondent's employees and cards were signed, meetings were held and Respondent's plant was handbilled. Commencing in July and continuing thereafter openings for which Smith was qualified occurred but Respondent did not recall her. It is clear that Respondent's asserted reasons for failure to recall Smith were mere pretexts and not the real reason for its action. Under all the foregoing circumstances, including the shifting nature of Respondent's defenses, I believe and find that the real reason for Respondent's failure to recall Smith was her known strong allegiance to the Union. I therefore find that Respondent discriminatorily refused to recall Smith on July 21, 1967, and thereafter because of her union activities and did thereby violate Section 8(a)(3) and (1) of the Act.

C. *The Discharge of Townsend*

The complaint alleges that Respondent violated the Act by discharging James E. Townsend, Jr. It is conceded by the General Counsel that Townsend violated Respondent's valid no solicitation rule which was instituted in October 1966. The rule reads as follows:

> OUTSIDE BUSINESS. EMPLOYEES SHALL NOT SOLICIT MEMBERSHIPS, OR SUBSCRIPTIONS FOR ANY PUBLIC OR PRIVATE ENTERPRISE NOR SHALL MONEY BE COLLECTED OR ACCEPTED FOR PLEDGES, MEMBERSHIPS, SUBSCRIPTIONS, OR ADMISSIONS TO ANY PUBLIC OR PRIVATE ENTERPRISE OR FOR GIFTS OF ANY NATURE ON COMPANY TIME WITHOUT THE CONSENT OF THE MANAGEMENT. CIRCULATION OR PASSING OR ANY PETITIONS OR NOTICES AMONG EMPLOYEES (ONE TO ANOTHER) IS PROHIBITED. EMPLOYEES ARE NOT ALLOWED TO LOAN OR COLLECT MONEY OR TO SELL OR BUY ITEMS OF PERSONAL PROPERTY ON COMPANY TIME

Townsend was discharged on October 20, 1967. The General Counsel contends, however, that Respondent treated Townsend's violation of the rule differently than it did other employees who violated the rule or put another way that Townsend received disparate treatment and his violation of the rule was a mere pretext and the real reason for his discharge was union activities. The issue then is whether General Counsel has established disparate treatment. General Counsel in his brief details the other instances of solicitation upon which he relies. We turn to the testimony in support of this contention.

Frank Todd testified that he has seen collard green and tomatoes sold on Company time. Todd stated that some time after the vacation of July 1967 Supervisor Nolin came by and told him that Mae Norton was sell-

ing tomatoes and asked him if he wanted any. This was about 11 a.m. and not on a lunch break. Todd then went out and bought some tomatoes. Todd testified that he and other employees would pick up the tomatoes the next day on the back porch after they clocked in in the morning. Todd stated that Pursser knew of this activity and testified about a time when he and Pursser went out on the porch one morning and moved some collard greens in order to get to some tobacco. Another instance of solicitation relied upon by the General Counsel occurred when an employee identified only as "Granny" asked Todd on Company time to buy some collard greens. This happened in October or November of 1967. Another instance occurred when Todd and others were loosening wrapper and a female employee named Thomas came in wearing some stockings and said that Nolin had sent her in to show them the stockings. This was in 1967 sometime.

Frank James was an employee from August to late November or early December 1967 and testified that he saw a lady selling cookies (he could not identify her) but it is unclear whether this was on Company time or not. James placed the incident in the packing department in 1967 while he was employed but without further specificity as to time and date. James also testified that he saw a memo sent around on Company time by two ladies in the packing department — one named Marsel Tarr and the other unidentified — asking for money for Christmas presents for his supervisor — Serefino and another employee named Albert.

Alma Reynolds testified that her immediate supervisor was Mrs. Nolin. Reynolds testified that she saw a flower pot passed around on Company time on more than one occasion to collect money for employees who were sick or employees who had died. This was placed as occurring in 1967. Reynolds also testified that Nolin sold Avon products on Company time in 1967 on more than one occasion but could not recall what month in 1967 this occurred. On cross-examination Reynolds ad-

mitted that any products she bought from Nolin were already placed on her machine when she reported to work. Reynolds also admitted that she paid Nolin for products before she began her work. Further, Reynolds testified that Nolin announced to employees in the stripping department that collections for flower funds on Company time would have to be setopped. This was sometime after October 26, 1967. Reynolds also admitted that she had heard that Nolin had said that she would not be able to take orders and deliver and collect for Avon products on Company time.

Nolin testified that she advised her employees that the flower pot fund was cancelled at a time which was some 8-10 months before the hearing of this case. Nolin testified that she herself did not sell Avon products but had accepted orders for a friend. Nolin further testified that she told her employees in November 1966 that if they wanted Avon products they would have to tell her on their time or call her at home. Nolin stated that she has accepted orders for Avon products recently from employees when they start to leave work or at lunch time. She has delivered Avon products to employees' houses and placed them at employees' machines at noon time or early in the morning before she goes to work. Nolin stated that she had accepted money from employees for Avon products at lunch time or in the evening or at her home. Further Nolin stated that she asked Vega's permission to sell Avon products but that Vega imposed the condition in November 1966 that she would have to restrict it to non-worktime. She then cautioned the employees to that effect. Nolin also testified that she had not seen any collections for flower funds recently on Company time.

Nolin testified that a memo directed to supervisors was posted in her department this past Christmas of 1967 where employees could see it. This memo (Respondent's Exhibit 6) relates to the exchange of Christmas gifts by employees and states also there should be no collections of money on working time or exchange

of gifts on work time. Nolin denied ever receiving money for Avon products on Company time but did admit after being shown her Board affidavit that once in a while employees hand money to her as they are working and as she walks by. This has occurred since Vega spoke to her.

Juan Cueva testified that employees asked him in the fall of 1967 if gifts would be exchanged at Christmas time. He told them he would have to take it up with Vega, which he did. Two or three days after he talked to Vega the memo referred to above was posted. Vega testified that the 1966 rules did not prohibit employees from exchanging gifts. Respondent had approximately 352 employees in its factory at the time of the hearing. Vega testified that when he found out about 2 years ago that Nolin was selling Avon products he stopped it.

The General Counsel had adduced some vague and indefinite evidence of scattered instances of solicitation on Company time since the rule went into effect in October 1966. But there were only a few instances established by the evidence that were shown to be known to supervisors. Of course, the Board has often held that knowledge of supervisors may be imputed to respondents. But here the only instances of solicitation or collecting money on Company time shown to be known to supervisors were those involving Nolin. These instances violated the rule but there is no evidence that Vega or Goldstein were aware of it. I do not believe that the fact that a supervisor personally interested in solicitation violates a Company rule against solicitation a few times in a factory of 352 employees is sufficient to show condonation by the Company of breach of the rules or disparate treatment. Nor do I believe the few instances of the circulation of the flower pot on Company time or the single instance of the circulation of the memo relating to Christmas presents are evidence of such widespread violations of the rule as

to require a different result.[12] I am also unable to attach the significance General Counsel seeks to Vega's memo to supervisors. I am satisfied that the memo was written because of the concern expressed to Cueva by employees over the exchange of Christmas gifts which was reported to Vega. I am persuaded from the record that Vega was interested in enforcing the Company's rule against solicitation on Company time whether the solicitation involved Avon products, Christmas gifts or union activities. In short, I cannot find on this record that Respondent discriminatorily applied its no solicitation rule to Townsend.[13] Accordingly, I shall recommend the dismissal of this allegation.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of the Respondent set forth in Section III, above, occurring in connection with the operations of Respondent described in Section I, above, have a close, intimate, and substantial relation to trade, traffic and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

My Recommended Order will contain the conventional provisions entered in cases of this kind involving discrimination in violation of Section 8(a)(3) and (1) of the Act:

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[12] Cf. *Taylor Instrument Company*, 165 NLRB No. 83.

[13] In view of this finding, I cannot attach the significance General Counsel desires to his argument that Townsend's interference with Respondent's work processes was minimal. In any event, I note that the interference herein unlike that in the *Taylor* case, supra, relied upon by the General Counsel was more than minimal involving conversations between Townsend and the employee solicitated (Martin) on two different occasions, and also the solicitation herein unlike that in *Taylor* was admittedly violative of Respondent's rule.

Cease and desist from the unfair labor practices found and from in any other manner infringing upon the statutory rights of its employees; offer Tellis Smith immediate, full and unconditional employment in her former job or substantially equivalent position of employment without prejudice to her seniority or other rights and privileges, and reimburse her for any loss of pay suffered as a result of the discrimination against her in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289, 291-293 and *Isis Plumbing & Heating Company*, 138 NLRB 716; and post appropriate notices.

Conclusions of Law

1. Respondent is engaged in commerce within the meaning of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By discouraging membership in a labor organization through discrimination in employment and by interfering with, restraining and coercing employees in the exercise of their rights under the Act, Respondent has engaged in and is engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act.

4. Respondent has not, as alleged in the complaint, violated the Act by the discharge of James E. Townsend, Jr.

RECOMMENDED ORDER

Upon the basis of the foregoing findings of fact and conclusions of law and pursuant to Section 10(c) of the National Labor Relations Act as amended, it is recommended that Respondent, Universal Cigar Corporation, its officers, agents, successors and assigns shall:

1. Cease and desist from:

(a) Discouraging membership in the Cigar Makers International Union, AFL-CIO, or in any other labor organization of their employees by refusing to recall any employee or in any other manner discriminating in regard to hire or tenure of employment or any term or condition of employment.

(b) Interrogating employees with respect to their union activities.

(c) In any other manner interfering with, restraining or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Offer to Tellis Smith immediate, full and unconditional employment in her former job or substantially equivalent position of employment without prejudice to her seniority or other rights and privileges and make her whole for any loss of pay suffered by her in the manner set forth in the Section entitled "The Remedy."

(b) Notify the above-named employee if presently serving in the Armed Forces of the United States of her right to full employment upon application in accordance with the Selective Service Act and the Universal Military Training and Services Act, as amended, after discharge from the Armed Forces.

(c) Upon request make available to the Board and its agents for examination and copying all payroll and other records containing information concerning Respondent's backpay obligation under this Recommended Order.

(d) Post at its factory at Clearwater, Florida, copies of the Notice attached hereto marked "Appendix."[14] Copies of said Notice on forms furnished by the Regional Director of Region 12 after being duly signed by an authorized representative of Respondent, shall be posted by Respondent immediately upon receipt thereof and maintained by it for a period of 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced or covered by any other material.

(e) Notify the Regional Director for the 12th Region, in writing, within 20 days of the receipt of this Trial Examiner's Decision what steps Respondent has taken to comply herewith.[15]

I further recommend the dismissal of the amended complaint insofar as it alleges Respondent violated the Act by the discharge of James E. Townsend, Jr.

Dated at Washington, D.C. June 20, 1968.

(Signed) W. EDWIN YOUNGBLOOD
W. Edwin Youngblood
Trial Examiner

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[14]In the event that this Recommended Order is adopted by the Board, the words "A DECISION AND ORDER" shall be substituted for the words "A RECOMMENDED ORDER OF A TRIAL EXAMINER" in the Notice. In the further event that the Board's Order is enforced by a decree of the United States Court of Appeals, the words "A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER" shall be substituted for the words "A DECISION AND ORDER."

[15]In the event that the Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify said Regional Director, in writing, within 10 days from the date of this Order what steps the Respondent has taken to comply herewith."

APPENDIX

NOTICE TO ALL EMPLOYEES

Pursuant to
The Recommendations of a Trial Examiner of the
NATIONAL LABOR RELATIONS BOARD
and in order to effectuate the policies of the
NATIONAL LABOR RELATIONS ACT

we hereby notify our employees that:

WE WILL NOT refuse to recall or take any other discriminatory action against any employee because he is a member of or supports the CIGAR MAKERS INTERNATIONAL UNION, AFL-CIO, or any other labor organization.

WE WILL NOT ask you questions about your union activities.

WE WILL offer to Tellis Smith employment in her former job or substantially equivalent position of employment without loss of any seniority or other rights and we will make Smith whole for any loss of pay she may have suffered by reason of the discrimination against her.

All our employees have the right to form, join or assist any labor organization or not to do so.

WE WILL NOT interefere with, restrain or coerce our employees in the exercise of these rights.

UNIVERSAL CIGAR
CORPORATION
(Employer)

Dated_____ By_____
(Representative) (Title)

Note: We will notify the above-named employee, if presently serving in the Armed Forces of the United States, of her right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act of 1948, as amended, after discharge from the Armed Forces.

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, Room 706, Federal Office Building, 500 Zack Street, Tampa, Florida, 33602 (Tel. No. 228-7227).

APPENDIX G

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are as follows:

RIGHTS OF EMPLOYEES.

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid

or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

UNFAIR LABOR PRACTICES

Sec. 8 (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it.

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.

Sec. 8(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.